

ARIZONA

REAL ESTATE BULLETIN

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On-line Edition

Department's '98 Omnibus Bill introduced in Legislature Repeals buyer-broker employment agreement

Senate Bill 1061, the 1998 Real Estate Omnibus Bill, introduced in the 43rd Legislature on January 14, would repeal a controversial change in the law enacted last year which requires buyer broker employment agreements to contain the same elements as a listing agreement, and to be put in writing. (See "News from the Commissioner" on page 3.)

Also of interest to licensees is a proposed amendment to A.R.S. § 32-2135(A) which will once again require that licensees include continuing education certificates with their applications for license renewal. The 1997 amendment to the statute required licensees to simply certify that they had taken the required continuing education courses and required that licensees retain the school-issued education certificates in their files for five years.

Other proposed changes to the real estate statutes are:

A.R.S. § 32-2101(11) — The definition of cemetery broker would be changed to clarify that the broker is dealing in interment rights instead of interment services.

A.R.S. § 32-2101(46) — Provides a

definition for a "provisional license" which may be issued after an administrative hearing or pursuant to a consent order when it is deemed in the public's best interest to place appropriate and relevant restrictions on a licensee.

A.R.S. § 32-2121(A) — Amended to provide that a corporation is exempt from obtaining a real estate license if it deals with its own property and acts through its officers.

A.R.S. § 32-2123(B)(7) — The limitation of using the applicant's social security number or federal tax identification number is expanded to include other government purposes.

A.R.S. § 32-2125(H) — Clarifies that when an entity or sole proprietor is no longer authorized to do business in Arizona, any broker's license issued to that entity or sole proprietor terminates until the situation is remedied.

A.R.S. § 32-2135(B) — Requires licensees applying for license renewal to submit continuing education certificates attesting to the required continuing education hours. Deletes the requirements that licensees retain possession of the certificates for

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Mauro Pando appointed to Advisory Board

Mauro Pando has been appointed to a six-year term as a member the Arizona Real Estate Advisory Board by Governor Jane Dee Hull, replacing Ruth Finn whose term has expired.

Mr. Pando, a Certified Marriage and Family Therapist, is the Counseling Coordinator for the Franciscan Renewal Center in Scottsdale, and maintains a private practice in individual and family counseling.

He received a bachelor's degree from the University of Notre Dame and studied theology at the Universidad Catolica de Chile in Santiago. He is a Clinical Member of the American Association of Marriage and Family Therapy.

1997 Arizona Real Estate Law Book now available

The 1997 Arizona Real Estate Law Book is now available from the Department's offices in Phoenix and Tucson, and can be ordered by mail.

This new edition is a completely new book. Although it comprises fewer pages than last year's edition due to the use of thinner paper and smaller type, the 1997 edition contains a great deal of information not available in previous editions plus a far more detailed index.

The book contains sections on the following subjects:

- Real Estate Law
- Child Support Obligations
- Commissioner's Rules

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Who can initial a sales contract?

We received a communication from a broker the other day, a broker who has been licensed since 1986, suggesting that "it would be nice to be able to have the option to delegate the review of contracts to a designated

licensee on a permanent basis."

She went on to write, "For the larger broker, it would ensure the Department that a licensed agent was handling the process rather than a sec-

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Omnibus bill introduced

Continued from page 1

five years.

A.R.S. § 32-2136(C) — Requires designated real estate brokers to attend a broker audit clinic every other licensing period rather than once every four years.

A.R.S. § 32-2151.02(A) — Deletes the requirement that a buyer's broker employment agreement meet the same requirements as a listing agreement.

A.R.S. § 32-2153 — Amends the disciplinary statute to allow granting a "provisional license."

A.R.S. § 32-2156 — Revised to clarify that real estate brokers, as well as salespersons, are shielded from criminal, civil or administrative action for failing to disclose that a property is "stigmatized," and expanded to include a lessor of such property.

A.R.S. § 32-2157(A) and (B) — Changes the term "subdivider" to "developer" to extend coverage of the statute to all developers. Also replaces the requirement that a respondent file an answer in a disciplinary matter, which was inadvertently deleted.

A.R.S. § 32-2181.01 — Clarifies that the exemption applies to "the sale" of the land. The heading of the article reads "Sale of Subdivided Lands."

A.R.S. § 32-2181.02(B)(5) — Needed to adequately handle con-

sumer inquiries about out-of-state developments.

A.R.S. § 32-2183(B) — Clarifies and makes corrections to facilitate the Department's administration of the expedited registration program.

A.R.S. §§ 32-2187 - 2188 — The process and procedures for obtaining a qualifying judgment and applying to the Real Estate Recovery Fund are clarified.

A.R.S. § 32-2194.04(A)(5) — This change precludes the licensee from including the cost of additional services with the actual cost of cemetery property.

A.R.S. § 32-2194.04(A)(6) — This change makes it mandatory for the licensee to disclose whether goods or services offered by a cemetery may be purchased separately from another vendor.

A.R.S. § 32-2194.10 — Clarifies the developer's responsibility if there is a material change to the development plan for a cemetery.

A.R.S. § 32-2194.28(E) — Requires cemetery owners to file annual reports with the Department regarding sales and financial status. On-site audits by the Department will still be conducted.

A.R.S. § 32-2195.01 — Clarifies that the exemption applies to the sale of the land.

A.R.S. § 32-2195.02 — Changes "subdivider" to "developer" and allows a reduced amendment fee.

A.R.S. § 32-2195.03(B) — Clarifies and makes corrections to facilitate

the Department's administration of the expedited registration program.

A.R.S. § 32-2195.04 — Non-substantive changes are made to the unsubdivided land statutes for uniformity with changes made to subdivided land statutes.

A.R.S. § 32-2195.10 — Clarifies the developer's responsibility if there is a material change to the development plan of unsubdivided lands.

A.R.S. § 32-2197.03 — Clarifies the developer's responsibility if there is a material change to the development plan of time-shares.

A.R.S. § 32-2197.13 — Clarifies that the exemption applies to the sale of time-share intervals. Written for uniformity with other development exemption provisions.

A.R.S. § 32-2198.01(D) — Replaced by new A.R.S. § 32-2198.15.

A.R.S. § 32-2198.03(B) — Rewritten for uniformity with other development exemption provisions.

A.R.S. § 32-2198.15 — Clarifies the developer's responsibility if there is a material change to the membership camping plan.

The text of Senate Bill 1061, as introduced, can be found on the Department's World Wide Web site at www.adre.org. Click on "Late-Breaking News." The summary published here reflects amendments (mostly deletions) which are not currently reflected in introduced version. We will update the text of the bill on our web site in the near future. Ed.

Customer Service provides the answers...well, most of them

Between July 1, 1996 and June 1, 1997, our Customer Services Specialists fielded 77,461 telephone calls from licensees and members of the public requesting help in real estate matters. Another 1,144 people visited the Department's offices. An increasing number of people are sending their inquiries to the Department via e-mail.

Although we try to satisfy every caller, there are certain things the Department can and cannot do.

We can:

- Tell you your license expiration date.
- Provide information about continuing education requirements, license reinstatement, and renewal.
- Provide information about licensing requirements, experience and continuing education waivers.
- Refer callers to relevant real estate

statutes and Commissioner's Rules, all of which can be found on the Department's World Wide Web site.

- Provide information about a person's license status, employing broker, business address and telephone number.
- Disclose formal action that has been taken against a license. However, your request for such information must be submitted in writing. If the information can be provided, you will be given a date to appear at the Department to inspect the licensee's records.
- Fax requested forms and literature.
- Provide a list of approved real estate schools which provide prelicensure and continuing education.
- Explain the process for filing a formal complaint against a licensee.
- Refer callers to agencies and organizations which may be able to provide

help which the Department cannot provide.

We cannot:

- Practice law. This means we cannot provide advice or interpretations of contracts or provide legal advice.
- Become involved in any way in the resolution of commission disputes.
- Recommend a real estate salesperson, broker or real estate firm.
- Reveal whether an individual or entity has had a complaint lodged against them unless the complaint has been resolved through a Consent Order or a Commissioner's Order.
- Get involved in disputes over ethics.
- Answer questions or resolve disputes regarding Arizona's Landlord and Tenant Acts.
- Answer questions or resolve disputes regarding homeowner's associations.



Jerry Holt

News From The Commissioner

As you will see when you read the story on page 1, Senate Bill 1061, the Department's 1998 Omnibus Bill, has been introduced in the Legislature. The bill is sponsored by Senator Pat Conner (R-Yuma) and co-sponsored by Senators Tom Freestone (R-Mesa) and Elaine Richardson (D-Tucson).

Of interest to many of you will be the Department's decision to repeal the requirement, enacted last year, that all buyer broker agreements contain the same elements as a listing agreement, and be put in writing.

Last year's change was well intentioned, but, as a practical matter, it just didn't work. The problem was defining when an agreement existed and thus when the requirement was triggered. The

confuseion was wide-spread and the Department's Customer Service Division telephones were ringing off the hook with calls from both licensees and members of the public.

We agree with AAR President John Foltz when he says "If you have an agreement, it makes good sense to put the agreement in writing so everyone clearly understands its terms." However, if Senate Bill 1061 goes through the legislative process and is signed by Governor Hull, having a Buyer's Broker Employment Agreement will not be *legally* required. And, pending the passage of Senate Bill 1061, the Department will not require buyer broker agreements to be in writing.

As I have mentioned before, the Department is working on quite a

few changes to the Commissioner's Rules. We are still evaluating suggested changes and hope to have a Rules Package written shortly. The proposed changes will be posted on our web site at www.adre.org and summarized in the Bulletin.

As some you have noticed (thank you for your very positive comments), we have changed the format in which documents appear on our web site. Many of you already have the software required to view and print the documents. If you don't, you can download it from our web site in a few minutes.

The use of Adobe Acrobat has enabled us to post documents so that you can view and print them exactly as they were created. It's a decided improvement over our previous software.

I am very pleased that Governor Hull has selected Mr. Mauro Pando to serve as a member of the Arizona Real Estate Advisory Board. His rich and diverse background will, I am sure, be of great benefit to the Department and to the other Board members.

I also want to thank outgoing member Ruth Finn for her contributions during her term on the Board. We will miss her.

When are your licensed employees independent contractors?

by L. Eric Dowell

Reprinted from the January 1998 issue of the Arizona Journal of Real Estate & Business, with permission.

Arizona law provides that "a broker shall employ and pay only active licensees, and a licensee shall accept employment and compensation as such only from the legally-licensed broker to whom the licensee is licensed." See A.R.S. § 32-2155(A). Commissioner's Rule R4-28-302(B) further provides that the "employing broker" shall notify the Commissioner when a licensee "enters [the broker's] employ." Of course, every designated broker knows the he or she must "exercise reasonable supervision and control over the activities of salespersons, associate brokers or others under his employ." See A.R.S. 32-2153(A)(21). By the use of the words "employ" and "employment," these statutes and the Rule suggest

that all licensees are employees of their designated broker.

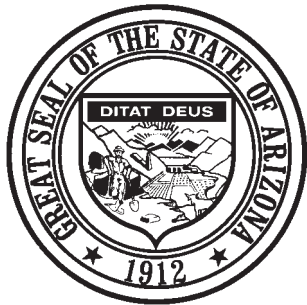
Notwithstanding the "employer-employee" terminology in the statutes and Rules, many designated brokers regularly enter into "independent contractor" agreements with their licensees. However, just because a broker and a licensee enter into an independent contractor agreement does not necessarily mean that the licensee is an independent contractor in the eyes of the law.

Numerous courts and administrative tribunals have ignored and rejected certain "independent contractor" agreements which mischaracterize the worker's true status as an employee. The consequences of such a mischaracterization may be devastating to a business.

If a court, tribunal or administrative agency, i.e., Internal Revenue Service, finds that a worker is incorrectly classified as an independent

contractor, the employer may have to pay all of the federal and state income taxes that were not properly withheld from the employee's pay, as well as all applicable penalties and interest. The employer may also be responsible for paying unemployment taxes, back premiums for worker's compensation insurance, and the employer and employee contributions for social security. The employer may also have to pay the employee's back wages, interest and certain other fringe benefits. However, with respect to worker's compensation insurance, the Arizona worker's compensation statute provides a special break for real estate employers and provides that a real estate licensee will not be considered an employee if (1) substantially all of the licensee's pay is directly related to sales or other services rather than the number of hours worked, and (2) there is a written

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1998 Schedule of Broker Audit Clinics

A.R.S. § 32-2136 requires all newly licensed real estate brokers to attend a Broker Audit Clinic presented by the Department within 90 days of issuance of their original broker's license. *Effective July 21, 1997, all designated real estate brokers must also attend a Broker Audit Clinic within 90 days after becoming a designated broker unless the broker has attended an audit clinic during the broker's current licensing period.* All designated brokers shall attend a broker audit clinic once during every four-year period after their initial attendance.

Seating is limited and reservations are required. To make a reservation for a Phoenix clinic, call the Department's Customer Services Division at (602) 468-1414, extension 100. In Tucson, call (520) 628-6940. Those who fail to make reservations will be turned away if seating is not available. Brokers who attend will receive three hours of continuing education credit in the category of Commissioner's Rules.

The following is the schedule of Clinics to be offered in Phoenix and Tucson during the remainder of 1998. Additional clinics may be scheduled from time to time at other locations in Phoenix and in rural areas.

PHOENIX

Industrial Commission Auditorium
800 W. Washington

Noon - 3 p.m.

February 20
March 20
April 17
May 15
June 19
July 17
August 21
September 18
October 23
November 20
December 18

TUCSON

State Office Building
400 W. Congress
Room 158

8:30 a.m. - 11:30 a.m.

February 19
March 19
April 16
May 7
June 11
July 16
August 20
September 17
October 22
November 19
December 17

The mission of the
Arizona Department of Real Estate
is to safeguard and promote the public interest
through timely and capable assistance,
fair and balanced regulation,
and sound and effective education.

ADMINISTRATIVE ACTIONS

REVOCATIONS

H-1870

Daniel A. Duran
Phoenix

DATE OF ORDER: November 6, 1997

FINDINGS OF FACT: Respondent submitted an application for an original real estate salesperson's license on January 30, 1997 in which he disclosed he had been convicted of felony DUI in 1994, and was currently (then) on probation. Under a February 20, 1997 Consent Order, the Department issued a two-year provisional license to Respondent. The Consent Order reflects Respondent's admission to the statement that he had no prior arrests.

Subsequently, as a result of fingerprint records, it was determined that Respondent had been arrested in 1982 for aggravated battery, convicted in 1983 for aggravated battery, convicted in 1984 for battery and bribery, and arrested in 1994 for domestic battery, a charge which had subsequently been dismissed.

Petitioner stated he had not tried to conceal the other charges, but that he had called an attorney who had advised him that the charges more than 10 years old did not need to be disclosed in the application.

On June 30, 1997, the Department summarily suspended Respondent's provisional license; Respondent appealed the suspension and requested an informal conference to resolve the matter. He stated that he had not intentionally made any false disclosure to the Department, that there were insufficient grounds for the Department to summarily suspend the provisional license, and that he had complied with all terms of the Consent Order.

The matter was not resolved informally, and a hearing was held in September 1997. VIOLATIONS: By failure to disclose the other convictions, Respondent received a provisional license by misrepresentation or deceit or by filing an original application which was false or misleading, in violation of A.R.S. §32-2153(B)(1). Respondent was convicted of a felony, a circumstance for which a license may be denied suspended or revoked pursuant to A.R.S. §32-2153(B)(2). Respondent made substantial misrepresentations on his application, in violation of A.R.S. §32-2153(B)(3). Based upon the above, Respondent is not a person of honesty, truthfulness and good character within the meaning of A.R.S. §32-2153(B)(7). DISPOSITION: Respondent's real estate salesperson's license is revoked.

H-1902

Jeffrey M. McDonald
Phoenix

DATE OF ORDER: November 24, 1997

FINDINGS OF FACT: On October 7, 1994, the Department issued Respondent a real estate salesperson's license. He applied for renewal of his license in October 1996.

The Department has discovered that Respondent has had several criminal arrests and convictions between 1993 and 1996 which he

failed to disclose on his original application or renewal application.

In April 1993, Respondent was arrested by the Scottsdale Police Department for one count of Sale of Prescription Drugs Only, a class 6 felony, and one count of Possession of Prescription Drugs, a class 1 misdemeanor. In January 1995, Respondent was convicted in Maricopa County Superior Court of one count of Sale of Prescription Drugs. In October 1995 and again in November 1996, Respondent was convicted in Scottsdale City Court for driving with a suspended license.

VIOLATIONS: By his actions, Respondent disregarded or violated provisions of Arizona Revised Statutes in violation of A.R.S. § 32-2153(A)(3); procured or attempted to procure a license by filing an original or renewal application which is false or misleading in violation of A.R.S. § 32-2153(B)(1); has been convicted of a felony in violation of A.R.S. § 32-2153(B)(2); made substantial misrepresentations in violation of A.R.S. § 32-2153(B)(3); has been guilty of conduct which constitutes fraud or dishonest dealings in violation of A.R.S. § 32-2153(B)(5); has not shown that he is a person of honesty, truthfulness and good character in violation of A.R.S. § 32-2153(B)(7); failed to notify the Commissioner within 10 days of any misdemeanor or felony conviction in violation of A.A.C. R4-28--301(C)(1).

DISPOSITION: Respondent's real estate salesperson's license is revoked.

RENEWAL APPLICATIONS APPROVED

H-1799

Rick R. Sowers
Phoenix

DATE OF ORDER: November 26, 1997

FINDINGS OF FACT: Respondent has been licensed as a real estate salesperson since March 1988. In April 1993 Respondent was arrested in Greene County, Missouri, with possession of more than 35 grams of marijuana, a class C felony. Respondent disclosed the arrest on March 29, 1994. Respondent's license was renewed on April 1, 1994. In July 1994, the Department informed Respondent that it was approving continued licensure but reserved the right to take future action.

On July 27, 1995, Respondent pleaded guilty to possession of marijuana, a class C felony. On August 4, 1995, Respondent notified the Department of the conviction.

On October 20, 1995, the Court placed Respondent on four years' probation in addition to other conditions. On March 26, 1996, the Department received Respondent's application for license renewal. On May 20, 1996, the Department denied the application for renewal. Respondent requested an administrative hearing, but the hearing was vacated by Order on October 9, 1986, based on the Department's Notice of Settlement and Motion to Vacate.

On September 9, 1996, Respondent was released from supervised probation which had been transferred to Arizona. During the pro-

bation period, Respondent was in drug and substance abuse counseling, subject to random drug testing and completed in excess of 500 hours of community service as well as complying with other conditions of probation.

Settlement in the matter was not accomplished and was subsequently submitted to the Office of Administrative Hearing and was scheduled to be heard on October 22, 1997.

VIOLATIONS: Respondent has been convicted of a felony in violation of A.R.S. § 32-2153(B)(2).

DISPOSITION: Respondent's application for license renewal is approved subject to these conditions:

a. Respondent shall abstain completely from the use of any illegal drugs or controlled substances unless taken pursuant to a valid prescription and the orders of a physician, doctor or other person authorized by law to issue such prescription.

b. Respondent shall submit to body fluid tests, randomly drawn, not exceeding one test per 30 day period, at the request of the Department's Compliance Officer.

c. Prior to renewal of the license, Respondent shall submit to the Compliance Officer the name of a person selected to function as sobriety monitor who shall agree in writing to such selection and its attendant responsibilities.

d. Respondent shall enter into a contract with the sobriety monitor for attendance at Narcotics Anonymous meetings and/or meetings with the sobriety monitor, with a minimum attendance of one meeting per week. The sobriety monitor shall report any breach of the sobriety contract to the Compliance Officer.

e. Within 10 days of being employed by a broker or within 10 days of the effective date of this Order, Respondent shall obtain from the employing broker a signed statement to be filed with the Compliance Officer certifying that such broker has received a copy of this order and that the broker agrees to submit to the Compliance Officer monthly written reports attesting to Respondent's workload, quality of services and client relationships, and to report any conduct which violates real estate statutes, rules or precepts or standards as prescribed by the National Association of Realtor's Code of Ethics.

CONSENT ORDERS

H-1913

Edward N. Hook
Arizona State Prison, Florence

DATE OF ORDER: November 28, 1997

FINDINGS OF FACT: Respondent was issued an original real estate broker's license in June 1986. His license will expire on June 30, 1998.

In September 1996, Respondent was arrested by the Mesa Police Department on Suspicion of Conspiracy to Commit Murder as the result of his attempt to hire a "hit man" to kill his estranged wife's boyfriend. He was indicted in Maricopa Superior Court on the charge in September 1996. On February 24, 1997, Respondent sent a Broker Change Form to the Department requesting that his residence address be changed and that his broker

designation status be changed to "self-employed."

In June 1997, Respondent entered into a plea agreement in which he pleaded guilty to Conspiracy to Commit Aggravated Assault, a class 3 felony, and in August 1997 was sentenced to serve five years in prison.

VIOLATIONS: Respondent failed to notify the Commissioner of his conviction within 10 days, in violation of A.A.C. R4-28-302(C)(1). As a result of his conduct, Respondent has disregarded or violated provisions of Arizona Revised Statutes, Title 32, Chapter 20, and the Commissioner's Rules in violation of A.R.S. § 32-2153(A)(3). Respondent has been convicted of a felony, in violation of A.R.S. § 32-2153(B)(2). His conduct and actions show he is not a person of honesty, truthfulness and good character, within the meaning of A.R.S. § 32-2153(B)(7).

DISPOSITION: Respondent's real estate broker's license is revoked.

H-1917

Ryland Homes of Arizona, Inc., Joseph P. Behrendt, David Garcia and Pamela Matthis Scottsdale

DATE OF ORDER: December 4, 1997

FINDINGS OF FACT: Matthis was issued an original real estate broker's license in January 1978. That license expires August 31, 1998. At all times material to this matter, Kaufman and Broad Homes Sales of Arizona, Inc., a corporation licensed as a real estate broker, was the broker of record for Matthis.

Behrendt is a licensed real estate broker and was appointed as designated broker for Ryland Homes of Arizona, Inc., in February 1996. Behrendt resigned as designated broker in March 1997. While he was designated broker for Ryland Homes, he was responsible to ensure that salespersons and associate brokers employed by Ryland Homes were currently and actively licensed to the corporation. Ryland Homes is a corporation licensed as a real es-

tate broker.

David Garcia is a licensed real estate broker and was appointed as designated broker for Ryland Homes on March 7, 1997 and was responsible to ensure that salespersons and associate broker employed by Ryland Homes were currently and actively licensed to the corporation from and after that date.

On January 10, 1997, Matthis left the employ of Kaufman and Broad and was hired by Ryland Homes. The Department was not notified of Matthis' change of employing broker. Between January 29, 1997 through July 10, 1997, Matthis provided real estate services for which a license is required on behalf of Ryland Homes without being properly licensed to Ryland Homes.

In August 1997, Kaufman and Broad notified the Department that it had severed Matthis from its employ.

At the time she notified the Department that she had conducted sales activities for Ryland Homes, Matthis disclosed she had received \$6,809.74 in salary, bonuses and commissions and anticipated receipt of an additional \$1,856.74 in commissions on a total of six transactions.

Matthis stated that at the time she was severed from Kaufman and Broad she assumed that the severance and her license were returned to the Department. She further stated that when she went to work for Ryland Homes she understood that Ryland Homes would take care of all the required paperwork for the Department.

Garcia stated on behalf of Ryland Homes that their failure to properly notify the Department of Matthis' employment was an oversight of administrative duties.

VIOLATIONS: Matthis accepted compensation from a licensed broker other than the broker to whom she was legally licensed, in violation of A.R.S. § 32-2153(A)(7). She received or anticipates receiving compensation in violation of Arizona Revised Statutes, Title 32, Chapter 20,

within the meaning of A.R.S. §§ 32-2153(A)(10) and 32-2155(A). Ryland Homes employed and paid, or planned to pay, compensation to an associate broker who was not properly licensed to Ryland Homes, in violation of A.R.S. § 32-2155(A). By failing to ensure that Matthis was properly licensed to Ryland Homes, Ryland Homes, Garcia and Behrendt demonstrated negligence in performing acts for which a license is required, in violation of A.R.S. § 32-2153(A)(22). Ryland Homes and Behrendt failed to notify the Department of Matthis' employment, and Ryland Homes and Garcia failed to notify the Department within 10 days of Matthis' termination of employment, in violation of A.A.C. R4-28-302(B) and -303(C), respectively. Respondents disregarded or violated provisions of Arizona Revised Statutes, Title 32, Chapter 20, within the meaning of A.R.S. § 32-2152(A)(3), as described above. **DISPOSITION:** An earlier Consent Order entered into between Matthis and Department is hereby vacated and superseded with this Consent Order upon entry.

Matthis may maintain her current active status license. Matthis shall take six hours of approved real estate continuing education, in addition to hours required for license renewal in topics specified by the Department. She shall pay a civil penalty in the amount of \$1,000.

Ryland Homes, Garcia and Behrendt, jointly and severally, shall pay a civil penalty in the amount of \$2,000.

Garcia and Behrendt shall each take six hours of approved real estate continuing education, in addition to hours required for license renewal in topics specified by the Department.

Garcia, as designated broker for Ryland Homes, shall develop and document in-house procedures for ensuring notification to the Department of the hire and severance of licensed employees, and the receipt of a current license for each licensee, and shall submit a copy of the procedures to the Department's Compliance Officer.

Employees

Continued from page 3

agreement between the licensee and employer and the agreement provides that the licensee will not be treated as an employee with respect to such services for federal tax purposes and for purposes of the worker's compensation statutes. *See* A.R.S. § 23-910 (1989).

To determine whether a worker is an independent contractor or employee, the courts and the administrative agencies have developed various factors which must be analyzed under the facts and circumstances of each employment relationship, and no one factor is generally determinative. The IRS has promulgated a list of 20 factors for employers to consider in classifying

their workers. For example, a worker may be considered an employee if, among other factors:

- The employee must comply with the employer's instructions;
- Receives training from or at the direction of the employer;
- Has a continuing relationship with the employer;
- Performs work on the employer's premises;
- Is not paid by the job or by commission; and
- Can be discharged at the will of the employer.

All of these factual determinations generally boil down to how much control, both in terms of manner and means by which the result is to be accomplished, an employer exercises over the services of the worker.

For example, in one case, which was decided well before A.R.S. § 23-

910 was enacted, real estate licensees who worked under the control of a licensed broker and who were terminable at-will were considered "employees" for purposes of the Arizona worker's compensation statute and not independent contractors even though the licensees were paid strictly on the basis of commissions from which withholding taxes were not deducted, worked no set hours, and even though some salesmen were employed at other regular jobs. *See Hughes v. Industrial Commission*, 113 Ariz. 517, 558 P.2d 11 (1976).

To increase the likelihood that an independent contractor agreement will be enforced and that the worker will be deemed to be an independent contractor and not an employee, at a minimum an independent contractor agreement should:

Continued on next page

H-1926

**Joseph Lam, dba Joe Lam Realty
Glendale**

DATE OF ORDER: December 19, 1997

FINDINGS OF FACT: Lam, who was issued an original real estate broker's license in July 1995, allowed his license to expire on July 31, 1997 without renewing it.

Between August 1, 1997 through October 2, 1997, Lam provided real estate services without being properly licensed. He submitted a late renewal application to the Department on October 2, 1997, in which he disclosed that while unlicensed he acted as a real estate broker by authoring one purchase contract which had not closed escrow at the time of this order, and for which Lam has not been paid the \$3,164.70 commission.

Respondent states that his failure to timely renew his license was due to the fact that he has not been actively selling real estate. He stated he thought he had sent his renewal application to the Department in August 1997. VIOLATIONS: Respondent engaged in business requiring a real estate broker's license while not being licensed to do so, in violation of A.R.S. § 32-2122(B). He acted as a real estate broker after his license expired in violation of A.R.S. § 32-2130(B). He received or anticipates receiving compensation in violation of Arizona Revised Statutes, Title 32, Chapter 20, within the meaning of A.R.S. § 32-2153(A)(10). He failed to pay the license renewal fee promptly and before the time specified, in violation of A.R.S. § 32-2153(A)(14). He demonstrated negligence in performing an act for which a license is required, in violation of A.R.S. § 32-2153(A)(22). He disregarded or violated the provisions of Arizona Revised Statutes Title 32, Chapter 20, within the meaning of A.R.S. §§ 32-2122(C) and 32-2153(A)(3). DISPOSITION: Respondent's renewal application is approved. He shall pay the Department a civil penalty in the amount of \$500 and shall take six hours of approved real estate continuing education, in addition to hours required for license renewal, in topics specified by the Department. He shall offer to refund or not accept the commission earned while his license was expired.

- State that an independent contractor relationship exists and the parameters of that relationship;
- State that the company does not have control over the way the workers perform their jobs;
- Provide for payment by specific project;
- Provide that the workers supply all of their tools and equipment and pay for all out-of-pocket expenses;
- State that workers are responsible for employment taxes and worker's compensation coverage for them and their employees.
- Limit the duration of the working relationship to three to six months.

H-1927

**SCI Arizona Funeral Services, Inc., Virginia
"Ginny" M. Pascoe, and Robert Luin Cox
Phoenix**

DATE OF ORDER: December 30, 1997

FINDINGS OF FACT: Cox was issued an original cemetery salesperson's license in November 1994. His license expired November 30, 1996. At all times material to this matter, Cox was employed as a cemetery salesperson by SCI Arizona Funeral Services, Inc., a corporation licensed as a cemetery broker.

Pascoe is a licensed cemetery broker and was appointed designated broker for SCI in July 1993. She resigned as designated broker on November 4, 1997. While Pascoe was designated broker for SCI, she was responsible to ensure that salespersons and associate brokers employed by SCI were currently and actively licensed to the corporation.

On October 22, 1997, Cox submitted a later renewal application. Between December 1, 1996 and October 22, 1997, Cox provided cemetery services for which a license is required and received commissions on the sale of cemetery property while his license was expired. At the time he submitted his application, Cox stated that while his license was expired he had acted as a cemetery salesperson in 107 transactions involving the sale of cemetery plots, niches and crypts and that he had received 15,576.64 in commissions and anticipated receipt of an additional \$4,964.50 in commissions.

Cox and Pascoe stated that failure to renew was an oversight because the renewal notice had not been received. VIOLATIONS: Cox engaged in activities for which a cemetery salesperson's license is required pursuant to A.R.S. §32-2122(B) while not licensed to do so, in violation of A.R.S. §32-2153(B)(6). He accepted and received, or anticipates receiving, compensation in violation of Arizona Revised Statutes Title 32, Chapter 20, within the meaning of A.R.S. §§32-2153(A)(7), 32-2153(A)(10) and 32-2155(A). He failed to pay his license renewal fee promptly and before the time specified, in violation of A.R.S. §32-2153(A)(14). He continued to act as a cemetery salesperson after his license expired and while his rights to act as such were terminated, in violation of A.R.S. §32-2130(B).

It is important to keep in mind that even though these provisions may be contained in an independent contractor agreement, if they are not really adhered to and the broker treats the independent contractor like an employee, then the broker still runs the risk that the licensee may be deemed to be an employee.

The information contained herein is not to be considered as legal advice. L. Eric Dowell is a member of the law firm of Bryan Cave LLP and practices business, real estate and employment litigation. He may be reached at (602) 208-9327.

olation of A.R.S. §32-2130(B).

SCI, by and through Pascoe, employed and paid, or planned to pay, compensation to a salesperson whose license had expired, in violation of A.R.S. §§ 32-2153(A)(6) and (A)(10) and 32-2155(A).

Pascoe, as designated broker for SCI, failed to exercise reasonable supervision over the activities of Cox in violation of A.R.S. §32-2153(A)(21).

Cox, Pascoe and SCI demonstrated negligence in performing an act for which a license is required, in violation of A.R.S. §32-2153(A)(22).

Respondents disregarded or violated provisions of A.R.S. Title 32, Chapter 20, within the meaning of A.R.S. §32-2153(A)(3), as described above.

DISPOSITION: Cox's renewal is granted.

Pascoe's license shall be suspended for a period of 30 days effective upon entry of this Consent Order.

Pascoe and SCI, jointly and severally, shall pay a civil penalty in the amount of \$2,000.

Cox and Pascoe shall each take six hours of continuing education, in addition to hours required for license renewal, in the topic of Commissioner's Rules.

SCI shall develop, document and implement in-house procedures for each SCI office to use to track license expiration dates and to prevent a recurrence of the violations cited herein.

SCI and Cox shall offer to refund commissions and/or compensation earned by or through Cox while his license was expired.

Fingerprint requirements expanded

Recently the Department began requiring fingerprint cards from those applying for temporary membership camping and cemetery salesperson's licenses.

The problem is this: No prelicense education or state examination is required to obtain one of these temporary licenses.

Unfortunately, we have seen a disturbing number of people who have obtained temporary licenses, tried to make a quick buck by using shoddy sales practices, then — when the license expires — move on to more fertile fields.

We are able to obtain reports from the Arizona Department of Public Safety and the F.B.I. regarding an applicant's criminal record based on fingerprints, far faster than before. It is hoped that fingerprinting applicants for these temporary licenses will dissuade the bad guys from entering the profession, even temporarily.

Do you retain records properly?

The Department's Customer Service Division receives many calls from real estate brokers who, apparently unaware of the requirements of real estate statutes, ask when they severed a particular licensee from their employment.

A.R.S. § 32-2151.01(A) states: Each licensed employing broker shall keep records of all real estate, cemetery, time-share or membership camping transactions handled by or through the broker and shall keep em-

ployment records, including copies of employment status, for all current and former employees. The records ...shall include copies of earnest money receipts, closing statements...sales contracts, and if applicable, copies of listing contracts. The records shall be open at all reasonable times for inspection by the Commissioner.... The records...shall be kept for a period of at least five years from the date of the termination of the transaction or employment.

1997 Law Book

Continued from page 1

Arizona Landlord and Tenant Acts
Condominiums
Planned Communities
Administrative Hearings
Administrative Procedures Act
Arizona Fair Housing Act
Escrow Agents
Mortgage Brokers
Transaction of Insurance Business
Mortgages
Deeds of Trust
Attorney General's Fair Housing Rules
Consumer Fraud
Statute of Frauds
Trade Names
Real Estate Settlement Procedures Act
Arizona "Superfund" and WQARF Sites

To complement the printed edition of the book, the publisher has created a World Wide Web site where you may find the text of the book, search the text for words or text strings, and view and print selected portions of the book. You may reach the site through the Department's Internet web site at

www.adre.org.

A link to the Law Book will be found in the Table of Contents and in Late-Breaking News.

The entire body of Arizona Revised Statutes may be found on the Internet through the Arizona Legislative Information Service at

www.azleg.state.az.us.ars.

The cost for the 1997 edition is \$13 plus \$3 for shipping if ordered by mail. If you have not purchased a previous edition, you should also order the special seven-ring binder for \$7.

You may purchase the book at the Department's offices in Phoenix or Tucson, or send your check for \$13 for the book and \$7 for the binder (if you need one), plus \$3 for shipping for the book, or binder or book and binder, to:

Law Book
ADRE
2910 N 44th St Ste 100
Phoenix AZ 85018

Who can initial?

Continued from page 1

retary using her employer's initials."

She assured the Department that *she* didn't have her secretary initial contracts, but that she knows that "larger brokers" do.

Just in case there's any confusion, here's the way it works. A.R.S. § 32-2151.01(G) states: "The designated broker shall review each listing agreement, purchase or nonresidential lease

How to contact ADRE by phone, fax and modem

PHOENIX OFFICE

(602) 468-1414

Fax Numbers

Administration

(602) 468-0562

Education and Licensing

(602) 955-6284

Subdivisions

(602) 955-9361

Customer Services

Extension 100

Public Information Officer

Extension 168

TUCSON OFFICE

(520) 628-6940

Fax (520) 628-6941

FAX RESPONSE SERVICE

(602) 468-1414, Extension 3

WORLD WIDE WEB

www.adre.org

E-MAIL

cdowns@adre.org

agreement or similar instrument within five days of the date of execution by placing the broker's initials and the date of review on the instrument on the same page as the signatures of the parties. A designated broker may authorize in writing an associate broker who the designated broker employs to review and initial these instruments on the designated broker's behalf."

Having a secretary initial contracts could subject a broker to the potential of thousands of dollars in civil penalties for each contract the secretary initialed.

Arizona Department of Real Estate
2910 N. 44th Street, Suite 100
Phoenix AZ 85018